IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**No. 86-cr-263**
	:	
v.	:	
	:	
	:	**No. 04-cv-3958**
ANGEL PEREZ	:	

MEMORANDUM

GENE E.K. PRATTER, DISTRICT JUDGE JULY 9, 2010

Pending before the Court are three motions filed by *pro se* Petitioner Angel Perez, who is currently serving a 60-year prison sentence. Previously, Mr. Perez filed numerous motions and applications challenging his sentence, including a petition for a writ of *habeas corpus* under 28 U.S.C. § 2255, all of which have been denied. Mr. Perez has now filed (1) an Application for Reconsideration of the Court's June 20, 2008 Order denying his Application for Modification of Sentence; (2) a Motion to Correct a [sic] Illegal Sentence Pursuant to F.R.C.P. 35; and (3) a Petition to Proceed In Forma Pauperis and for Appointment of Post-Appellate Counsel. For the following reasons, the Court will deny Mr. Perez's current filings.

I. BACKGROUND

This case has an almost 25-year history. In 1986, Mr. Perez was convicted in this Court on two counts of being a felon in possession of firearms in violation of 18 U.S.C. App. § 1202(a)(1) (a predecessor to the current Section 922(g)) and two counts of possession with the

intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1).[1] The sentencing court found Mr. Perez to be a dangerous special offender under 18 U.S.C. § 3575, and, on January 30, 1987, sentenced him to 60 years in prison. Mr. Perez appealed his sentence to the Court of Appeals for the Third Circuit, which affirmed without an opinion. Mr. Perez then petitioned the Supreme Court for a writ of certiorari, which was denied on February 29, 1988.

On August 20, 2004, Mr. Perez filed a *pro se* motion for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2255, requesting relief from his sentence. At that time, Mr. Perez also filed a series of related motions and applications. The Court denied Mr. Perez's petition, motions, and applications by Memorandum and Order dated July 27, 2006.

Mr. Perez appealed to the Court of Appeals for the Third Circuit on August 21, 2006, which denied his request for a certificate of appealability. With no other matters pending on the docket, this Court issued an Order on September 7, 2007 closing the case.

However, on April 14, 2008, Mr. Perez filed an Application for Modification of Sentence under 18 U.S.C. § 3582(c)(2) pursuant to the retroactive "crack" amendments to the Federal Sentencing Guidelines.[2] The Court denied his Application on June 20, 2008, holding that the retroactive "crack" amendments did not offer any relief to Mr. Perez because he was originally

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[1] Mr. Perez was acquitted on Count I of the superseding indictment, which also charged him with being a convicted felon in possession of a firearm.

[2] The "crack" amendments refer to Amendment 706 to the Sentencing Guidelines, adopted on November 1, 2007 and made retroactive. United States v. Doe, 564 F.3d 305, 308 (3d Cir. 2009). The Amendment decreased the base offense level of defendants being sentenced for crack offenses by two levels. Id. The Amendment only applies "in the case of a defendant who has been sentenced to a term of imprisonment *based on a sentencing range that has subsequently been lowered by the Sentencing Commission . . . .*" 28 U.S.C. § 3582(c)(2) (emphasis added).

sentenced on January 31, 1987, before the Sentencing Guidelines that were altered by the "crack" amendments became effective on November 1, 1987.

On August 26, 2008, Mr. Perez filed an Application for Reconsideration of the Court's June 20, 2008 Order, a Motion to Correct A[n] Illegal Sentence Pursuant to Rule 35(a), and a Petition to Proceed In Forma Pauperis and for Appointment of Post-Appellate Counsel.

II. APPLICATION FOR RECONSIDERATION

Mr. Perez first moves for reconsideration of the Court's June 20, 2008 Order denying his Application for Modification of Sentence. The Federal Rules of Criminal Procedure do not contain a rule specifically discussing motions for reconsideration. However, our Local Rule of Criminal Procedure 1.2 adopts for use in criminal cases Local Rule of Civil Procedure 7.1(g), which states that "motions for reconsideration or reargument shall be served and filed within ten (10) days after the entry of the judgment, order, or decree concerned." If a motion for reconsideration is not timely filed, then the district court lacks jurisdiction to consider it. See, e.g., United States v. Arrate-Rodriguez, 160 Fed. Appx. 829, 833 (11th 2005) (stating that motions "for rehearing or reconsideration of a criminal judgment . . . are within the district court's jurisdiction to consider, but only if timely filed."); United States v. Thompson, 79 Fed. Appx. 22, 23 (5th Cir. 2003) ("Thompson's motion for reconsideration was filed 36 days after entry of the order denying the § 3582(c)(2) motion. The motion was therefore untimely, and the district court was without jurisdiction to entertain it."); United States v. Enigwe, No. 92-257, 2006 WL 1340527, at *3 (E.D.Pa. May 15, 2006) ("Because Enigwe filed the Motion for Reconsideration long after the ten-day period had expired, the Court lacks jurisdiction to reach

the merits of his claim.").

Absent specific guidance under the criminal procedural rules, the Court looks to the jurisprudence of Federal Rule of Civil Procedure 59(e) in considering Mr. Perez's motion. United States v. Lee, 82 F. Supp. 2d 389, 390-91 n.4 (E.D.Pa. 2000) (citing Rankin v. Heckler, 761 F.2d 936, 942 (3d Cir. 1985) ("Regardless how it is styled, a motion filed within ten days of entry of judgment questioning the correctness of the judgment may be treated as a motion . . . under Rule 59(e).")). A motion for reconsideration is not to be used as a means to reargue a case or merely to ask a court to rethink a decision it has made. Armstrong v. Reisman, No. 99-4188, 2000 WL 288243, at *2 (E.D.Pa. March 7, 2000). Certainly, it is not a substitute for an appeal. See Waye v. First Citizen's Nat'l Bank, 846 F. Supp. 310, 314 (M.D.Pa. 1994). A motion for reconsideration must rely on at least one of three grounds: 1) intervening change in controlling law; 2) availability of new evidence not previously available; or 3) need to correct a clear error of law or prevent manifest injustice. N. River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995); Waye, 846 F. Supp. at 313-14.

Mr. Perez claims to have submitted a "Notice of Intention" to file a motion for reconsideration of the Court's June 20, 2008 Order on June 30, 2008. Nonetheless, it is undisputed that the actual motion was not filed until August 14, 2008, long after the ten-day period had expired. Therefore, the Court lacks jurisdiction to consider Mr. Perez's Application for Reconsideration and will dismiss the application.

Even assuming, *arguendo*, the Court had jurisdiction, the Court would deny the motion for the same reasons set forth in the Court's June 20, 2008 Order. In that Order, the Court denied Mr. Perez's Application because "Mr. Perez was originally sentenced on January 31, 1987, a date

well before the Federal Sentencing Guidelines became effective on November 1, 1987, so that the retroactive "crack" amendments do not apply to Mr. Perez in this instance." (Doc. No. 132.) Quite simply, Mr. Perez's sentence pre-dated the Federal Sentencing Guidelines that were subsequently amended by the "crack" amendments. See United States v. Torres-Nunez, No. 87-416, 2008 WL 2127761, at *2 (S.D.N.Y. May 19, 2008) (holding that petitioner's reliance on the crack amendments was misplaced because "[h]e was not sentenced under the Guidelines, and he could not have been, as his conduct occurred . . . before the effective date of the Guidelines."). Thus, Mr. Perez's current arguments are besides the point. The "crack" amendments simply do not apply to his case.

III. MOTION TO CORRECT AN ILLEGAL SENTENCE

Mr. Perez's Motion to Correct A[n] Illegal Sentence invokes former Federal Rule of Criminal Procedure 35(a) (the "former Rule 35"), which was controlling at the time of Mr. Perez's conviction and, unlike the current Rule 35(a), permitted correction of an illegal sentence "at any time."[3] Rule 35 is "limited to consideration of the validity of a sentence itself," and courts have consistently held that Rule 35 could not be used to challenge the merits of the underlying conviction. United States v. Smith, 839 F.2d 175, 182 (3d Cir. 1988).

The Court sentenced Mr. Perez to two 10-year sentences for the firearm counts, which represented an increase of 8 years on each count over the 2-year maximum sentence provided by

[3] Rule 35(a) currently provides that "[w]ithin 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Fed. R. Crim.P. 35(a). Because Mr. Perez's motion addresses only the former Rule 35(a), which is available to him, the Court's reference to Rule 35(a) in this Memorandum is to the former Rule.

18 U.S.C. § 1202. In addition, the District Court sentenced Mr. Perez to two 20-year sentences for the drug counts, which represented an increase of 5 years on each count over the 15-year maximum sentence provided by 21 U.S.C. § 841. The District Court imposed a sentence greater than the statutory maximums because it found Mr. Perez to be a "dangerous special offender" pursuant to 18 U.S.C. § 3575(b),[4] which provided that if the district court finds that a person convicted of a felony is also a dangerous special offender, then it can sentence that person to imprisonment "for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for the [underlying] felony."[5] 18 U.S.C. § 3575(b); United States v. Davis, 710 F.2d 104, 105 (3d Cir. 1983).

Mr. Perez challenges his 60-year sentence as being "illegal" because, in finding him to be a dangerous special offender and enhancing his sentence beyond the statutory maximums, the sentencing court violated Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt." Id. at 490. Mr. Perez made essentially the same argument in his *habeas corpus* petition, and the Court rejected this argument because Apprendi and its progeny do not apply retroactively on collateral review. See United States v. Perez, No. 86-263, 2006 WL 2225950, at *3 (E.D.Pa.

[4] Section 3575 has since been repealed with respect to crimes committed after November 1, 1987. See Sentencing Reform Act of 1984, Pub.L. No. 98-473, tit. II, § 212(a)(2), 98 Stat. 1987.

[5] Of note, "§ 3575 does not preclude the imposition of consecutive sentences which, in the *aggregate*, exceed twenty-five years, so long as each individual sentence does not exceed twenty-five years." United States v. Towne, 870 F.2d 880, 888 (2d Cir. 1989) (emphasis in original).

July 27, 2006).

Construing Mr. Perez's *pro se* motion, the Court looks to the substance of the relief requested rather than the caption or label of the motion. See United States v. Bohn, No. 92-61-02, 1999 WL 1067866, at *3 (E.D.Pa. Nov. 9, 1999) (courts consider relief sought by petitioners, not labels attached to petitions, and "if it walks and talks like a successive § 2255 motion, then we shall treat it as such."); see also United States v. Clive, No. 05-0383, 2009 WL 4823806, at *2 (W.D.Pa. Dec. 14, 2009) ("It is the function of the motion under consideration and the nature of the relief sought that determines what the motion is, not the label attached by the movant or the respondent."). The Court is also mindful that a § 2255 motion for *habeas corpus* relief is the presumptive means by which a federal prisoner can challenge the validity of his conviction or sentence, unless such a motion would be "inadequate or ineffective." Okereke v. United States, 307 F.3d 117, 120 (3d Cir. 2002).

Here, Mr. Perez was sentenced on January 30, 1987. The Third Circuit Court of Appeals affirmed Mr. Perez's conviction on September 11, 1987, and the Supreme Court denied certiorari on February 29, 1988. Mr. Perez has already filed a § 2255 for *habeas corpus*, which was denied on July 27, 2006. Given this long procedural history, it would elevate form over substance if the Court construed Mr. Perez's present motion, filed more than twenty-three-years after his conviction, as a direct appeal of his sentence under Rule 35(a). In reality, Mr. Perez's current challenge to his conviction is an attempt to file a second § 2255 motion. See United States v. Kostrick, 49 Fed. Appx. 377, 379 (3d Cir. 2002) ("A motion made pursuant to old Rule 35, however, is not the appropriate vehicle for [an Apprendi] challenge" because "[a] challenge to the constitutionality of a sentence is more properly asserted in a petition for habeas corpus

relief."); United States v. Boyd, 591 F.3d 953, 956 (7th Cir. 2010) ("[T]he second motion in this case was not really a Rule 35(a) motion; it was a section 2255 motion - a wolf in sheep's clothing."); United States v. Grandison, 85 Fed. Appx. 320, 321 (4th Cir. 2003) (construing petitioner's Rule 35(a) motion as a successive § 2255 motion and rejecting petitioner's contention that a Rule 35(a) motion is not a collateral attack, as petitioner's direct appeal already concluded and petitioner's previous § 2255 motions were denied); United States v. Becerra, 84 Fed. Appx. 902, 902 (9th Cir. 2003) ("Becerra contends that a Rule 35(a) motion does not seek collateral review, but rather should be considered a part of the direct appeal process. This contention lacks merit because Becerra's direct appeal is long past, and his sentence had long been final.").

Construing Mr. Perez's current motion as a second § 2225 motion attacking his sentence, it is clear that Mr. Perez is not entitled to relief. As noted, Mr. Perez has already filed one § 2255 motion, which was denied by this Court. In order to file a second or successive § 2255 motion, Mr. Perez must obtain leave from the Court of Appeals for the Third Circuit. See 28 U.S.C. §§ 2244, 2255. It may be that Mr. Perez captioned this motion under the former Rule 35(a) because permission to file a second or successive § 2255 motion is granted only upon showing of either newly discovered evidence of innocence or a new rule of constitutional law made retroactive by the Supreme Court to cases on collateral review. 28 U.S.C. § 2255; see Kostrick, 49 Fed. Appx. at 379 ("Clearly, Kostrick, having previously filed a habeas petition, should be seeking permission to file a second successive motion. By pursuing relief under Rule 35, he is attempting to avoid the requirements for filing a second petition as set forth in 28 U.S.C. § 2255."). Mr. Perez would have a difficult time making such a showing because the Third Circuit

appellate court has already determined that Apprendi, the basis for his current motion, is not retroactive to a successive habeas petition. In re Turner, 267 F.3d 225, 231 (3d Cir. 2001); see Kostrick, 49 Fed. Appx. at 379 ("Were [petitioner] to seek permission to file a second successive petition based on Apprendi, [petitioner] would be barred because Apprendi has not been 'made retroactive to cases on collateral review by the Supreme Court.'" (internal citation omitted)).

Thus, because Mr. Perez has not obtained leave from the Court of Appeals, this Court lacks jurisdiction to entertain his second § 2255 motion and the motion is therefore dismissed.[6] Robinson v. Johnson, 313 F.3d 128, 139-40 (3d Cir. 2002); see also Boyd, 591 F.3d at 957 ("A district court has no jurisdiction to entertain a successive section 2255 motion without the consent of the court of appeals, here not sought or given - and [petitioner's] second motion was in substance and therefore in law a section 2255 motion.").

IV. PETITION FOR COUNSEL

Mr. Perez requests that the Court appoint "Post-Appellate" counsel to represent him on his Motion to Correct an Illegal Sentence. As noted above, Mr. Perez's Rule 35(a) motion is an attempt to rehash arguments previously rejected in his habeas petition and the Court has construed it as such. When Mr. Perez filed his petition for *habeas corpus*, he requested appointment of counsel at that time and the Court denied that request. Nothing has changed in

[6] Even if the Court construed Mr. Perez's Motion under the former Rule 35(a), the Court would hold that Mr. Perez is not entitled to relief because it appears that Apprendi does not apply retroactively unless a direct appeal was pending at the time that Apprendi was decided. See United States v. Clarke, No. 90-238, 2004 WL 1237351, at *1 (E.D.Pa. Apr. 28, 2004) (citing United States v. Vasquez, 271 F.3d 93, 99 (3d Cir. 2001)). Because Mr. Perez's conviction became final long before Apprendi was decided, Apprendi is not applicable to Mr. Perez's Rule 35(a) motion.

the interim. Thus, for the same reasons previously explained, the Court denies Mr. Perez's current request for counsel. See United States v. Perez, No. 86-263, 2006 WL 2225950, at *6 (E.D.Pa. July 27, 2006).

V. CONCLUSION

For the foregoing reasons, the Court dismisses Mr. Perez's (1) Application for Reconsideration of the Court's June 20, 2008 Order; dismisses his (2) Motion to Correct a [sic] Illegal Sentence Pursuant to F.R.C.P. 35; and denies his (3) Petition for Appointment of Post-Appellate Counsel.[7]

BY THE COURT:

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GENE E.K. PRATTER
United States District Judge

[7] Mr. Perez may proceed In Forma Pauperis so that his filings in that regard are granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**No. 86-cr-263**
	:	
v.	:	
	:	
	:	**No. 04-cv-3958**
ANGEL PEREZ	:	

ORDER

AND NOW, this 9th day of July, 2010, upon consideration of Petitioner Angel Perez's Petition for Appointment of Counsel (Doc. No. 133), Application for Reconsideration of the Court's June 20, 2008 Order (Doc. No. 134), and Motion to Correct a [sic] Illegal Sentence Pursuant to F.R.C.P. 35 (Doc. No. 135), it is hereby ORDERED that:

1. Mr. Perez may proceed In Forma Pauperis so that his filings in that regard are GRANTED;
2. Mr. Perez's Petition for Appointment of Counsel (Doc. No. 133) is DENIED;
3. Mr. Perez's Application for Reconsideration (Doc. No. 134) is DISMISSED; and
4. Mr. Perez's Motion to Correct a [sic] Illegal Sentence Pursuant to F.R.C.P. 35 (Doc. No. 135), which is more properly construed as a successive § 2255 motion, is DISMISSED.

BY THE COURT:

_____
GENE E.K. PRATTER
United States District Judge